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## REEXAMINING THE ARGUMENTS IN OWEN M. FISS, *AGAINST SETTLEMENT*

*Kenneth R. Feinberg\**

You may think that I have been added to this panel to cause trouble. Owen is Jimmy Stewart in *Destry Rides Again*<sup>1</sup> and I'm Brian Donlevy, and I'm here to cause trouble.<sup>2</sup> That's not true. My goal is to get Owen to go back to Yale and write a sequel to this seminal article.<sup>3</sup> And I'm not sure what the sequel should be. It might be *Still Against Settlement*. It might be, by the end of the day, *Against Settlement Sometimes*. Or it might be, just like *The Godfather I* and *II*, *Against Settlement II*. That's up to Owen as author.

But I think he should update what has proven to be one of the handful of law review articles that have truly been precedent setting. There is the article by Louis Brandeis and Samuel Warren about privacy,<sup>4</sup> and Hans Zeisel's works, those fabulous *University of Chicago Law Review* articles about how juries behave.<sup>5</sup> We all have our favorites.

*Against Settlement* is one of those articles that is critically important for everybody to read because of what it says and how it says it.

But I think, as a practical matter, twenty-five years later, the best way to look at Owen's article is as an article that is aspirational. It's a benchmark, food for thought. How close can we get to the benchmark?

What we have learned in the last twenty-five years since that article was written is that Owen's thesis, and the way he develops that article, have run up against two hard, practical realities that undercut his aspirational objective.

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1. *DESTRY RIDES AGAIN* (Universal Pictures 1939).

2. *Id.*

3. See Owen M. Fiss, *Against Settlement*, 93 *YALE L.J.* 1073 (1984).

4. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 *HARV. L. REV.* 193 (1890).

5. Hans Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 *U. CHI. L. REV.* 710 (1971) (scrutinizing the reduction of twelve-member juries to six members); Hans Zeisel & Shari Seidman Diamond, "Convincing Empirical Evidence" on the Six Member Jury, 41 *U. CHI. L. REV.* 281 (1974) (critically examining empirical evidence on six-member and twelve-member juries).

The first challenge is the inefficiency of the civil justice system. If you are against settlement in any realistic way, however you define it, what is the alternative? Few can agree with Owen in terms of the practical, day-to-day running of the civil justice system. The articles you read today are about the vanishing trial, not against settlement. No one wants to go to trial. The consumers of the civil justice system do not like the costs, the inefficiencies, the uncertainties, the frustrations, or the delays. That's one practical problem that undercuts the aspirational objective.

The second problem exposed in the last twenty-five years is the political inertia of the other branches of government. Effectively, if you are against settlement—well, what are you standing for? If you think Congress or state legislatures or the executive branch are going to promote the normative values that are otherwise sought in the civil justice system, you must be living on a different planet. On the part of the other branches of government, there is no realistic, day-to-day willingness to step in and ratify those norms sought by Owen. Whatever Judge Jack Weinstein<sup>6</sup> did in *Agent Orange*,<sup>7</sup> it was done because of an abdication on the part of other branches to step in and implement or ratify some of Owen's norms.<sup>8</sup> When you try to deal with the implications of Owen's piece, do not underestimate the challenges posed by inefficiency and political inertia, because they lead in the direction of settlement by default. You can't look at this problem in a vacuum and say, "We've got to be careful." Yes, we have to be careful in settlement, but what's the alternative?

Here's another way of looking at it. When I went to law school, at the time of Owen's article, who were the judges that were looked upon as the "first team"? Back in 1984, Judge Weinstein, Judge Edward Weinfeld,<sup>9</sup> and Judge Edward Gignoux in Maine<sup>10</sup> were the leading scholars. On the state bench it was Chief Judge Stanley Fuld<sup>11</sup> here in New York and Judge Roger Traynor<sup>12</sup> in California who were the scholars, the Cardozo types, who thought about how the law should develop and how the substantive and procedural law should be articulated.

It is different today. Today it's not Weinstein the scholar, it's Weinstein the case manager; it's Judge Charles Breyer in San Francisco,<sup>13</sup> to whom the Multidistrict Litigation (MDL) Panel looks for prompt, efficient

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6. Hon. Jack B. Weinstein, Senior Judge, U.S. District Court for the Eastern District of New York.

7. *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 690 (E.D.N.Y. 1984).

8. See Jack B. Weinstein, *Comments on Owen M. Fiss, Against Settlement (1984)*, 78 *FORDHAM L. REV.* 1265, 1268–69 (2009).

9. Hon. Edward Weinfeld, Judge, U.S. District Court for the Southern District of New York.

10. Hon. Edward Gignoux, Senior Judge, U.S. District Court for the District of Maine.

11. Hon. Stanley Fuld, Chief Judge, State of New York Court of Appeals.

12. Hon. Roger Traynor, Chief Justice, Supreme Court of California.

13. Hon. Charles Breyer, Judge, U.S. District Court for the Northern District of California.

litigation. It is Judge Eldon Fallon in Louisiana who has the *Vioxx* cases<sup>14</sup> that must be settled.

Today, let's make sure that the civil justice system is made more efficient, that the trains run on time, and that it is recognized that justice delayed is justice denied. If you are going to write an article about *Against Settlement*, by any reasonable definition, you had better consider the implications: What are we going to do with these cases in the absence of efficiency and in the absence of political will on the part of the other branches of government? What's the reality of the situation?

So what do we see? We see an attempt to deal with alternatives. Now, in the mass tort context, I think that the objectives advanced in Owen's article have already been met. What's the purpose of trying an asbestos case<sup>15</sup> or a tobacco case<sup>16</sup> or a *Zyprexa*<sup>17</sup> case? What's sought to be achieved? These are "mature torts," with little left to be decided.

The article that you should read next to Owen's article is one by Francis McGovern in the *Boston University Law Review* on the maturation of litigation.<sup>18</sup> And others have written about this. There comes a time when we already know so much about the litigation—when we already know how mature the litigation is, the value sought to be achieved, the normative scope of the litigation—that it really doesn't make any sense to go forward and try the cases.

In most mature mass torts there must be an asterisk and footnote in Owen's piece saying, "My aspirational objectives have already been achieved in this litigation and, in the absence of Congress intervening, a settlement is fine." We already know what's transparent. We already know enough about that type of litigation that any desire to vindicate norms and values probably is unnecessary. It has been done over and over again.

Most mass torts—not all, but most—constitute a "mass" because honey attracts lawyers who see the likelihood of success based on vindication of certain values. In those cases, you don't have to confront any more of Owen's objectives.

Now, in the broader structural litigation, which is really what Owen was focusing on—the *Coney Island* desegregation cases,<sup>19</sup> the homeless cases<sup>20</sup>—the issue in those cases is not jury deliberation of liability and

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14. *In re Vioxx Prods. Liab. Litig.*, 448 F. Supp. 2d 737 (E.D. La. 2006).

15. *See, e.g., In re Joint E. & S. Dists. Asbestos Litig.*, 929 F. Supp. 1 (E. & S.D.N.Y. 1996).

16. *In re Simon II Litig.*, 211 F.R.D. 86 (E.D.N.Y. 2002), *vacated*, 407 F.3d 125 (2d Cir. 2005).

17. *In re Zyprexa Prods. Liab. Litig.*, 493 F. Supp. 2d 571 (E.D.N.Y. 2007).

18. Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659 (1989).

19. *Hart v. Cmty. Sch. Bd. of Brooklyn, N.Y. Sch. Dist. No. 21 (Coney Island)*, 383 F. Supp. 769 (E.D.N.Y. 1974).

20. *See McCain v. Dinkins*, 639 N.E.2d 1132, 1132 (N.Y. 1994) (upholding trial court's finding of civil contempt resulting from city's violation of court order requiring it to cease

damage. The first issue in those cases is, in the absence of political will on the part of the other branches of government, whether the judiciary would be willing to monitor, oversee, and bring transparency and sunlight in order to achieve an effective resolution of such structural litigation. We start with the premise that the judiciary, the third branch, by default is required to enter the fray.

Second, the question then becomes not the necessity of a bench trial or a jury finding of liability but, rather, the willingness of the judge to read Owen's article and make sure that, with transparency, outreach, notice, and opportunity to be heard, the values sought to be promoted in Owen's article are achieved.

One thing I have learned in the last twenty-five years in settling cases is that, ironically, most judges want no part of being directly involved in settlement discussions. Think about the irony. The article is entitled *Against Settlement*. Most federal judges that I deal with endorse that phrase, at least as it impacts them directly. They have no interest in getting directly involved in any settlement process. Philosophically, they find that they have an aversion to direct involvement in settlement. Most trial judges that I deal with welcome settlement: "We're all for it, but don't ask us to play any significant role whatsoever."

Now, the reason that judicial aversion to being involved in settlements becomes very important is that if in structural reform you are looking for proactive judges to vindicate Owen's values by promoting transparency, sunlight, outreach, notice, and opportunity to be heard, then you can put the number of federal judges on two hands.

Instead, what I find are judges who will say, "Go for it. Great. Don't ask me. I'll do what I have to do under the rigorous training that I've received at the Federal Judicial Center. I don't oversee. I don't want to monitor. I try cases. I'm the umpire. I have a role to play. So go ahead, Ken, be very creative, but I'll call you, don't call me."

Now, that's a problem. The other branches won't enter the fray on structural reform. The trial judge, by default, has to do it.

But then you start discussing how to monitor *Coney Island*,<sup>21</sup> or

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housing homeless families at welfare office emergency assistance units, but holding as improper trial court's order that city officials spend night in emergency assistance unit); see also Leslie Kaufman, *One Constant in Homeless Litigation: New York v. the Judge*, N.Y. TIMES, Nov. 12, 2002, at B1.

21. 383 F. Supp. 769.

prisons,<sup>22</sup> or the homeless in Manhattan<sup>23</sup>—Justice Helen Freedman<sup>24</sup> was criticized for the way she tried to monitor day-to-day, homeless family disposition in Manhattan. I was her Special Master. She was criticized by politicians, private litigants, and the Legal Aid Society.<sup>25</sup> It was a no-win for her. And yet, she realized that in order to vindicate some of the values that Owen discussed in his piece, she had to withstand the criticism, and she has been vindicated by the New York State Court of Appeals. But it is very difficult.

So those problems come up because of inefficiency and political inertia. A judge steps in—if you can find a judge willing to vindicate those rights.

And, then, you run into this problem, which Susan Sturm talks about, of reflecting normative values.<sup>26</sup> I don't know about that. If you can find a trial judge willing to vindicate those normative values, chances are that you are going to have a trial judge who is going to vindicate his or her own personal normative values.

I remember in *Agent Orange* how the court, the Special Master, and the consultants all worked together. But, every once in a while you would pause when one of the lawyers would say, “What are you doing? You're making it up as you go along.” Well, the Second Circuit approved the settlement.<sup>27</sup> In effect the court said, “We approve the settlement, affirmed. However, don't come back again with one of these.”

So I wonder if there is a better way. Well, maybe Owen will write an article that will be entitled *Settlement: A Better Way*. But I don't know what's a better way. The system is so inefficient that the consumers of the system don't want to use it—that's clear. And when they use it, they want to use it just as long as it will serve as leverage to get a result. That result need not be a bench trial or a jury finding.

When you turn and say to the Congress, “Do something about asbestos”<sup>28</sup>—“No”; “Well, do something about DES”<sup>29</sup>—“No”; “Well, do

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22. *Benjamin v. Malcolm*, 495 F. Supp. 1357 (S.D.N.Y. 1980) (holding that the overcrowding at Riker's Island is unconstitutional and ordering further reductions in prison population); *see also Benjamin v. Jacobson*, 935 F. Supp. 332 (S.D.N.Y. 1996), *aff'd in part, rev'd in part*, 124 F.3d 162 (2d Cir. 1997) (affirming that retroactive application of the Prison Litigation Reform Act to terminate consent decrees governing conditions in New York City jails is not unconstitutional, but reversing to the extent that the consent decrees were vacated, and holding that federal courts no longer have jurisdiction to enforce such decrees and detainees may seek relief from state courts).

23. *See Kaufman*, *supra* note 20.

24. Hon. Helen E. Freedman, Justice, New York State Supreme Court, Appellate Division, First Department.

25. *See, e.g., Kaufman*, *supra* note 20.

26. Susan Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 2007 J. DISP. RESOL. 1, 51–60.

27. *In re “Agent Orange” Prod. Liab. Litig.*, 818 F.2d 145 (2d Cir. 1987).

28. *In re Joint E. & S. Dists. Asbestos Litig.*, 929 F. Supp. 1 (E. & S.D.N.Y. 1996).

29. *In re DES Cases*, 789 F. Supp. 552 (E.D.N.Y. 1992).

something about prisons”<sup>30</sup>—“No”; “Well, do something about *Coney Island*”<sup>31</sup>—“No”; “Well, do something about . . .”—“No, no, no.” I don’t know what else you do. But you hope that the civil justice system and the judiciary will step in and vindicate the laws and values of the parties. How? Proactively.

Judge Weinstein went around the country in *Agent Orange*, before the Internet, and held hearings around the country.<sup>32</sup> “Come on in, consumers, Vietnam veterans, come on in. Tell me about it. Tell me, what do you want me to do?” Hearing after hearing. Pervasive notice. And he galvanized the Vietnam organizations, the soldier organizations—galvanized them, but not necessarily to be supportive. I’m not sure he cared whether they were supportive or not, as long as they were active, which was more important than being supportive. They had a stake in the venture at least.

I suspect in 2009 the best recipe for vindicating what Owen really wants vindicated is the trial judge who will be proactive, monitor, demand, reach out, and give all those interested an opportunity to be heard. That’s the best you can do today, I think. There are very few federal judges who want to do that—very few federal or state judges.

You can see now why I’m not Brian Donlevy.<sup>33</sup> I think what Owen wrote is aspirational. It is food for thought. It requires everybody to think. But I’m not sure, twenty-five years later, we have a better way other than the proactive trial judge who is going to try single-handedly to vindicate Owen’s theses.

Thank you.

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30. See *supra* note 22.

31. *Hart v. Cmty. Sch. Bd. of Brooklyn, N.Y. Sch. Dist. No. 21 (Coney Island)*, 383 F. Supp. 769 (E.D.N.Y. 1974).

32. See Symposium, *Judge Jack B. Weinstein, Tort Litigation, and the Public Good: A Roundtable Discussion To Honor One of America’s Great Trial Judges on the Occasion of His 80th Birthday*, 12 J.L. & POL’Y 149, 174–75 (2003).

33. See *supra* note 1 and accompanying text.